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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE ex rel. CITY OF WILLITS, Plaintiff and Appellant, v. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON et al., Defendants and Respondents.	A094534 (Sonoma County Super. Ct. No. 217769)

Insurance Code section 11580 (section 11580) requires certain insurance policies to include a provision that allows an action against the insurer after a judgment has been secured against its insured. If this direct action provision is not included in the policy, it is read into the policy.

The People of the State of California and the City of Willits, California, (collectively, the state) brought this action pursuant to section 11580 against Certain Underwriters at Lloyd's of London, and Certain London Market Insurance Companies (collectively, London Insurers). In bringing the action the state was attempting to collect a judgment for property damage caused by environmental contamination. The trial court granted summary judgment in favor of London Insurers after ruling that, in cases involving property damage, section 11580 allows a direct action against an insurer only when the property damage is caused by a vehicle or draught animal.

We conclude the trial court misinterpreted section 11580 and reverse the judgment.

I. BACKGROUND

The state sued Pneumo Abex Corporation (Pneumo Abex) and Whitman Corporation (Whitman) in federal court for damages for environmental contamination at and around a manufacturing facility in Willits. The federal court found both Pneumo Abex and Whitman liable for violations of state nuisance law and federal law. After the court made these findings, the parties signed a consent decree that established a trust fund to pay for the cleanup of the affected property. The consent decree further provided for entry of judgment against Pneumo Abex and Whitman in the amount of $9,350,000 in order to fund the trust. The decree also contained an injunctive order requiring Pneumo Abex and Whitman to pay additional sums beyond the judgment if demanded by the trust and necessary for the cleanup. The state, however, agreed not to execute on the judgment or on any order for additional sums on the assets of Pneumo Abex or Whitman, except for their rights to proceeds from certain insurance policies.

Six of these insurance policies were excess umbrella policies issued by London Insurers to a Stanray Corporation for policy periods running from December 31, 1966 to January 31, 1973. According to the federal court's findings of fact, Whitman and Pneumo Abex are corporate successors of Stanray Corporation. The policies provided comprehensive coverage for liability for personal injuries and damage to property, after payment of the policy limits of underlying policies. At all times, both before and after the consent decree, London Insurers denied they had an obligation to provide a defense in, or to cover any claims arising from, the federal court litigation.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.B. through II.E.

The state, as judgment creditor, filed this action pursuant to section 11580 to recover the judgment against Pneumo Abex and Whitman from London Insurers. The complaint stated two claims for relief: (1) for execution of the judgment and corresponding declaratory and injunctive relief, and (2) for unreasonable refusal to settle within the policy limits. London Insurers moved for summary judgment or summary adjudication, asserting among other things that the state could not maintain a direct action against London Insurers because the policies were not issued or delivered in California.[1] At the hearing on the motion, however, the trial court raised the issue of whether direct actions under section 11580 were limited to cases involving bodily injury, or property damage caused by an automobile accident.

After receiving additional briefing, the trial court first granted summary adjudication in favor of London Insurers, and then granted summary judgment in favor of London Insurers. The court found the policies did not contain a provision permitting a judgment creditor to file suit against London Insurers, and section 11580 did not require such a provision to be read into the policies. The court concluded that "Section 11580 only encompasses policies covering personal injury or property damage caused by draught animals and vehicles." The court entered judgment against the state on both of its claims.

The state appeals from the final judgment in favor of London Insurers.

II. DISCUSSION

A. *Section 11580 Direct Action for Property Damage*

The state contends the trial court erred in ruling that it could not bring a judgment creditor action against London Insurers pursuant to section 11580. We agree.

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[1] London Insurers also filed a cross-complaint against several cross-defendants, including Pneumo Abex and Whitman, seeking a declaratory judgment on the existence or absence of insurance coverage for the pollution damage. The question of coverage under London Insurers' policies is not at issue in this appeal.

Section 11580 provides: "A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this state unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein. [¶] (a) Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered: [¶] (1) Against loss or damage resulting from liability for injury suffered by another person other than (i) a policy of workers' compensation insurance, or (ii) a policy issued by a nonadmitted Mexican insurer solely for use in the Republic of Mexico. [¶] (2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable, other than a policy which provides insurance in the Republic of Mexico, issued or delivered in this state by a nonadmitted Mexican insurer. [¶] (b) Such policy shall not be thus issued or delivered to any person in this state unless it contains all the following provisions: [¶] . . . [¶] (2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

Subdivision (a) of section 11580 identifies the types of insurance policies that must contain the direct action provision. It is undisputed that London Insurers' policies insured against the kinds of losses described in subdivision (a). The policies insured against liability for loss or damage for both personal injuries and for property damage, including property damage resulting from the use of a vehicle or a draught animal.

As the policies insured against the kind of losses described in subdivision (a) of section 11580, they should have contained the direct action provision set forth in subdivision (b)(2). As they did not, the direct action provision must be read into the policies. That provision allows an injured person who has secured a judgment in an action based upon bodily injury, death, or property damage to bring an action against

the insurer on the policy. It is undisputed that the state has obtained a judgment based upon property damage.

In ruling that the state did not have a cause of action under section 11580, the trial court read the language from subdivision (a)(2), regarding a type of policy that must contain a direct action provision, into the direct action provision itself. The trial court took the words "draught animals" or "vehicles" from subdivision (a)(2) and inserted them into subdivision (b)(2). Thus, according to the trial court, only property damage caused by a vehicle or draught animal would support an action against an insurer. But the direct action provision in subdivision (b)(2) refers to judgments for property damage without any restricting language. If the policy contains a direct action provision or if one must be read into the policy, any judgment based upon property damage will support an action against an insurer by a judgment creditor.[2]

Contrary to the argument of London Insurers, this interpretation of section 11580 does not render any part of the statute meaningless. The reference to property damage caused by "draught animals" is archaic,[3] but the remaining language of section 11580, subdivision (a) expresses an intent to require a direct action provision

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[2] "Under section 11580 a third party claimant bringing a direct action against an insurer should therefore plead and prove: 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against loss or damage resulting from liability for personal injury or insures against loss of or damage to property caused by a vehicle or draught animal, 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against loss or damage resulting from liability for personal injury or insures against loss of or damage to property caused by a vehicle or draught animal." (*Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1015.)

[3] Section 11580 was derived from a statute enacted in 1919. (Stats. 1919, ch. 367, § 1, p. 776.)

in most liability policies issued to California residents. Insurers have responded by inserting the required language (commonly referred to as the "no action" clause) in their general liability policies. (See 4 Cal. Insurance Law & Practice (Matthew Bender 2001) Liability Insurance, § 41.60[1], pp. 118-119.) As a result, judgments against the insured for bodily injury, death, or property damage may be recovered by filing a second action against the insurer. We see no mischief in this result and we think it was what the Legislature intended. (See *Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 298 [section 11580 is a part of every policy and creates a contractual relation which inures to the benefit of any and every person who might be negligently injured by the insured as completely as if such injured person had been specifically named in the policy].)

The trial court cited *Rolf Homes, Inc. v. Superior Court* (1960) 186 Cal.App.2d 876 in its ruling, and London Insurers asserts *Rolf Homes* is "squarely on point." But *Rolf Homes* concerned a discovery dispute in a malpractice and fraud action against a civil engineer. The question presented was stated as follows: "Are civil engineers, sued for alleged malpractice and fraud, required to disclose whether or not they are insured against such liability?" (*Id.* at p. 877.) Section 11580 is mentioned in the *Rolf Homes* opinion only because earlier decisions had relied on the availability of a direct action against an insurer as a reason for allowing discovery of the existence and extent of liability insurance. (*Rolf Homes, supra,* at pp. 878-879.) The opinion notes that the professional malpractice policy at issue was not covered by section 11580 because that section "applies only to policies where the liability is for personal injuries under (a) (1), and where under (a) (2) the liability is caused by a draught animal or by a vehicle." (*Rolf Homes, supra,* at pp. 880-881.)

The decision in *Rolf Homes* lends no support for the trial court's ruling here. The *Rolf Homes* opinion discusses an entirely different issue, and its hypothetical

application of section 11580 was made without any reference to the actual terms of the policy or the actual injury suffered.[4]

Even less helpful is *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, the other decision cited by the trial court and London Insurers. That decision, involving property damage caused by a landslide, merely mentions in a footnote that one of the defendant insurers had argued that no direct action was available because the property damage was not caused by a vehicle or draught animal. (*Id.* at p. 508, fn. 1.) The *Pruyn* court, however, did not have to decide the issue because no one disputed the fact that the policies contained provisions allowing the direct action against the defendant insurers. (*Ibid.*)

We conclude it is not necessary for property damage to be caused by a vehicle or draught animal in order to bring a direct action against an insurer under section 11580. Because we reach this conclusion, it is unnecessary for us to consider the state's alternate arguments that (1) the underlying judgment was based in part on a nuisance claim that represented injury to a person within the meaning of section 11580 subdivision (a)(1), or (2) one of the policies (policy no. CX 0958) incorporated a direct action provision from an underlying policy.

B. *Policy Issued or Delivered to Any Person in this State*[*]

We must, however, briefly discuss an alternate ground for affirming the judgment urged by London Insurers. London Insurers contends: "Section 11580 only applies to policies that were issued or delivered in California, and the evidence is undisputed that the Policies were not issued or delivered in California."

The trial court declined to rule on this issue. Although this court may affirm the judgment if it is correct on any legal theory applicable to the case (*Western*

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[4] In any event, to the extent *Rolf Homes* interprets section 11580 in this narrow manner, we disagree with the interpretation.

[*] See footnote, *ante*, page 1.

Mutual Ins. Co. v. Yamamoto (1994) 29 Cal.App.4th 1474, 1481), we also decline to reach this issue.

First, we note that London Insurers misstates the issue. Section 11580 applies to insurance policies "issued or delivered *to any person* in this state." (Italics added.) This is a different question from that framed by London Insurers. Second, the trial court sustained the parties' objections to much of the evidence offered on this issue, and we cannot tell from the record before us which evidence the trial court considered admissible. (See Code Civ. Proc., § 437c, subd. (c) [court shall consider all evidence set forth in moving papers except that to which objections have been made and sustained by court].) Third, little of the evidence offered by London Insurers appears relevant to the question of whether the policies were issued or delivered to a person in this state. (Ins. Code, § 19 [person includes any association, organization, partnership, business trust, or corporation].)[5]

A party moving for summary judgment must make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) After reviewing the evidence in the record, we conclude London Insurers has not made a prima facie showing in support of their position on the issuance or delivery of the policies.

C. *Exhaustion of Policies Underlying Policy Number CX 0958*[*]

The trial court also granted summary judgment with respect to one of London Insurers' policies (policy no. CX 0958) on the separate and additional ground that the state had not "satisfied [the] exhaustion requirements" of that policy. The court

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[5] According to London Insurers, their evidence shows the policies were issued in England, delivered to a broker in England, and then relayed to Stanray Corporation in Chicago. But the policies refer to various "assureds" including Stanray Corporation, Stanray Corporation "ETAL," and several subsidiary corporations. Arguably the policies were issued or delivered to many "persons" and possibly one or more of them were in California.

found London Insurers met their burden on summary judgment by submitting the relevant policy language and the state's "factually-devoid discovery responses concerning the issue of exhaustion."

Policy number CX 0958 was in effect from December 31, 1968 to December 31, 1971. The policy's limit of liability was $15 million, payable after the exhaustion of the limits of underlying policies. The policy provides:

"LIMIT OF LIABILITY — UNDERLYING LIMITS

"It is expressly agreed that liability shall attach to the Underwriters only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:

"$ [10,000,000] ultimate net loss in respect of each occurrence . . . ."

The policy further provides:

"OTHER INSURANCE —

"If other valid and collectible insurance with any other Insurer is available to the Assured covering a loss also covered by this Policy, other than insurance that is in excess of the insurance afforded by this Policy, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance."

When policy number CX 0958 was first issued, the "Underlying Umbrella Policies" were three of the other London Insurers policies at issue in this case. In 1971, the London Insurers policies were replaced with "Underlying Umbrella Policies with C.N.A. and I.N.A." The various underlying umbrella policies were layered, requiring exhaustion of each underlying policy before reaching the next layer. The underlying umbrella policies were themselves in excess of primary coverage.

London Insurers has correctly stated the applicable insurance principles. Under California law, liability under an excess policy attaches only after all primary coverage has been exhausted. (*Community Redevelopment Agency v. Aetna Casualty*

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* See footnote, *ante*, page 1.

& Surety Co. (1996) 50 Cal.App.4th 329, 337-338 (*Community Redevelopment*).) Primary insurance is coverage under which liability attaches immediately upon the happening of an occurrence. (*Id.* at p. 337.)

Two types of exhaustion are required before liability will attach to policy number CX 0958. First, "vertical exhaustion" of the specific scheduled underlying (excess) policies. (See *Community Redevelopment, supra,* 50 Cal.App.4th at pp. 339-340.) Second, "horizontal exhaustion" of available primary insurance. (*Id.* at p. 339.) Because the damage or injury in this case was apparently continuous and occurred over many years, primary policies not expressly described in policy number CX 0958 may be deemed primary to CX 0958. (*Id.* at p. 340; see also *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 600.)[6]

London Insurers did not show in their summary judgment motion that liability could never attach under policy number CX 0958. London Insurers asserted that because the amount of the federal court judgment was less than $10 million, the damages against its alleged insureds were insufficient to exhaust the insurance underlying that policy. In response, however, the state showed the federal court had entered subsequent judgments against Pneumo Abex and Whitman for over $9.5 million. Thus, the combined federal court judgments against Pneumo Abex and Whitman were over $18 million.

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[6] The state argues that horizontal exhaustion should not be required because policy number CX 0958 specifically identifies the underlying policies. (See *Community Redevelopment, supra,* 50 Cal.App.4th at p. 340, fn. 6.) But accepting the state's argument means there were no primary policies in this instance—none was described in policy number CX 0958. The structure of the insurance coverage, the language of the policy, and the applicable insurance principles, however, lead us to conclude policy number CX 0958 was intended to be excess to (1) underlying primary policies regardless of whether such insurance was described in policy number CX 0958, and (2) the specifically described underlying umbrella polices. Exhaustion of other secondary or excess polices was not required.

Summary judgment law in this state requires a defendant moving for summary judgment to present evidence that the plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 854.) All the summary judgment motion showed was that coverage and payment under the underlying policies had not yet been resolved. In fact, the rights, duties and obligations of the various insurers, including the underlying umbrella insurers, were at issue as a result of the cross-complaint filed by London Insurers. If we were to affirm the summary judgment with respect to policy number CX 0958, the primary and underlying umbrella insurers could concede liability under their policies a month from now, for covered claims in excess of $10 million, and the state would collect nothing on policy number CX 0958 because of the final judgment in this case. Summary judgment principles do not require such a result.

It was premature to grant summary judgment based on failure to exhaust underlying coverage when coverage and payment issues remained to be resolved. The state may be able to prove exhaustion after further proceedings on the cross-complaint, or further negotiations between the other insurers, the state, Pneumo Abex, and Whitman. Future events may show the underlying policies will not be exhausted, but at this stage of the proceedings, exhaustion of the insurance coverage underlying policy number CX 0958 is a triable issue of fact.

D. *Duty to Settle*[*]

The state contends the trial court erred when it entered judgment on the state's claim for unreasonable refusal to settle within policy limits. Our conclusion that the trial court erred in ruling the state cannot maintain an action under section 11580 requires a reversal of the entire judgment. An insurer owes a duty to exercise good faith in not withholding adjudicated damages to a party who has secured a final judgment for damages against its insured. (*Hand v. Farmers Ins. Exchange* (1994) 23 Cal.App.4th 1847, 1858.) If the state can maintain an action under section 11580,

[*] See footnote, *ante*, page 1.

it is entitled to attempt to prove that London Insurers unreasonably withheld the adjudicated damages.

E. *Duty to Defend*[*]

In response to another summary adjudication motion by London Insurers, the trial court found London Insurers had no duty to defend Pnuemo Abex, Whitman or the state based on language in the policies that disavowed a duty to defend.[7] In one respect this ruling is puzzling—the state did not allege that London Insurers had a duty to defend the state. In any event, the state acknowledges that we need not discuss the duty to defend ruling in order to reverse the judgment. The state nevertheless asks this court to decide whether London Insurers had a duty to defend (presumably Pneumo Abex and Whitman) because it might have an impact on the binding effect of the underlying federal court judgment.

Pneumo Abex and Whitman, the parties directly affected by the duty to defend ruling, are not parties here. Arguably a finding that London Insurers wrongfully failed to defend Pneumo Abex and Whitman might strengthen the hand of the state, but as a practical matter it will probably have little effect in this case. Generally, an insurer will be bound by an underlying judgment as to all issues litigated and decided if the insurer received proper notice of the action. (See *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 884 [insurer who has had opportunity to defend is bound by judgment against its insured as to all issues which were litigated in the

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[*] See footnote, *ante*, page 1.

[7] The policies gave London Insurers the option to participate in any defense: "The Underwriters shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured but Underwriters shall have the right and shall be given the opportunity to associate with the Assured or the Assured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve Underwriters, in which event the Assured and Underwriters shall co-operate in all things in the defense of such claim, suit or proceeding."

action against insured]; *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386-387 [because insurer may be subject to direct action under section 11580 it may intervene in action against its insured].) London Insurers received notice of the federal court action and it appears that at least the issue of liability was tried in the federal court action.

The amount of the underlying judgment may be subject to challenge because it was determined pursuant to an agreement between the insureds and the injured parties, which raises a potential for abuse, fraud or collusion. (See *National Union Fire Ins. Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449.) Nevertheless, when "a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. Such a settlement will raise an evidentiary presumption in favor of the insured (or the insured's assignee) with respect to the existence and amount of the insured's liability. The effect of such presumption is to shift the burden of proof to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. If the insurer is unable to meet that burden of proof then the stipulated judgment will be binding on the insurer and the policy provision proscribing a direct action against an insurer except upon a judgment against the insured after an 'actual trial' will not bar enforcement of the judgment." (*Pruyn v. Agricultural Ins. Co., supra,* 36 Cal.App.4th at p. 509; see also *United Services Automobile Assn. v. Alaska Ins. Co.* (2001) 94 Cal.App.4th 638, 644.)

If London Insurers has wrongfully denied coverage, the state will be entitled to the evidentiary presumption set forth in *Pruyn,* regardless of the policy language disavowing any duty to defend.

III. DISPOSITION

The judgment against the state is reversed. The state shall recover its costs on appeal.

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Reardon, J.

We concur:

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Kay, P.J.

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Sepulveda, J.

Trial Court:	Sonoma County Superior Court
Trial Judge:	Hon. Raymond J. Giordano
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